

This letter discusses nexus. See *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992) and references the Department's drop shipment rules. (This is a GIL.)

July 23, 2008

Dear Xxxxx:

This letter is in response to your letter dated November 5, 2007, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.tax.illinois.gov to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

I am writing to you to clarify a sales tax situation that has come up between my company and one located in the state of Illinois. They are trying to collect sales tax on something that I do not believe I owe sales tax on, and I would like your legal opinion on it. I spoke to the Illinois Department of Revenue on the phone this afternoon and they suggested that I write you a letter to clarify this.

My company is located in the state of STATE. I do business only in the state of STATE. We sell and service office equipment such as copiers, fax machines, scanners, and paper shredders. Occasionally, we will sell a machine to a company located in STATE, but the equipment needs to be installed in another location, such as in the state of Illinois. The order is written, signed for, and paid for in the state of STATE. I order the equipment from my manufacturer, pay the manufacturer for it and have it drop-shipped to a local dealer in the area who then delivers and installs it for us. For their assistance, we pay them a sales commission on the order along with an installation fee for the delivery and installation.

This has just happened to us over the past week. The local installing dealer is telling us that if we cannot send them an Illinois resale certificate, that they are required to charge us sales tax on the sales compensation portion of the money that we are sending them. Please keep in mind that we are not buying anything from this dealer, only asking them to install the machine that we purchased from our manufacturer.

Of course, I do not have an Illinois resale certificate. I don't do business in your state. I am licensed to do business in the state of STATE and hold a resale certificate here. I have been in this industry for over 30 years and have never heard of charging sales tax on a sales commission. I believe that someone would have to eventually pay income tax on this, but sales tax?

I would also like to say that if I do owe this sales tax that I am more than willing to pay it. I'm not trying to weasel out of paying a tax; however, if I don't owe it, I don't feel that I should pay it.

I appreciate your time and consideration of my question, and I look forward to hearing from you soon. Thank you for your help.

DEPARTMENT'S RESPONSE:

Without reviewing the contractual arrangement you have with the local dealers we can only provide general information in response to your inquiry. The following information may be helpful.

NEXUS

Whether a company has nexus affects a company's Illinois tax obligations. The Department declines to make nexus determinations in the context of Private Letter Rulings or General Information Letters because the amount of information required to make such determinations is often best gathered by an auditor. However, the following information outlines the principles of nexus. We hope it is helpful to you in determining your Company's tax obligations.

The Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. See 86 Ill. Adm. Code 130.101. In Illinois, Use Tax is imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See 86 Ill. Adm. Code 150.101. These taxes comprise what is commonly known as "sales" tax in Illinois.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), established the current guidelines for determining the nexus requirements that must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails himself or itself of the benefits of an economic market in a forum state. *Quill* at 1910. The second prong of the Supreme Court's nexus test requires, if due

process requirements have been satisfied, that the person or entity have a physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please see *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410, (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax liability on the purchase of the goods and have a duty to self-assess and remit their Use Tax liability directly to the State. In such instances, those customers must remit their Illinois Use Tax along with a completed Form ST-44, Illinois Use Tax Return, unless they are otherwise registered or are required to be registered with the Department and remit their Illinois Use Tax with a Form ST-1, Illinois Sales and Use Tax Return. Many retailers that do not have nexus with the State have chosen to voluntarily register as Use Tax collectors as a courtesy to their Illinois customers so that those customers are not required to file returns concerning the transactions with those retailers.

DROP SHIPMENTS

You may wish to review the Department's drop shipment rules at 86 Ill. Adm. Code 130.225 which can be viewed on the Department's Internet website. These rules provide guidance in general drop shipment situations.

I hope this information is helpful. If you require additional information, please visit our website at www.tax.illinois.gov or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Richard S. Wolters
Associate Counsel

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